No. 14-462

IN THE
Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA, ET AL.,

Respondents.

On Writ of Certiorari to the California Court of Appeal, Second District

REPLY BRIEF FOR PETITIONER

MELISSA D. INGALLS
ROBYN E. BLADOW
SHAUN PAISLEY
KIRKLAND & ELLIS LLP
333 S. Hope St.
Los Angeles, CA 90071
(213) 680-8400

CHRISTOPHER LANDAU, P.C.
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com

August 13, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 3

I. State Law Rules Governing Contract Interpretation And Enforcement Are Subject To Long-Established Limitations Imposed By The FAA 3

II. The Court Below Erred By Refusing To Enforce The Parties' Arbitration Agreement. 13

III. Respondents' Arguments In Favor Of Dismissal Are Unavailing. 19

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

Ackerberg v. Johnson,
892 F.2d 1328 (8th Cir. 1989) 18

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995).....10

AT&T Mobility LLC v. Concepcion,
131 S. Ct. 1740 (2011) 11, 12, 17, 19, 23

Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006).....3, 20

Cohen v. DIRECTV, Inc.,
48 Cal. Rptr. 3d 813 (Cal. Ct. App. 2006).....23

CompuCredit Corp. v. Greenwood,
132 S. Ct. 665 (2012) 7

Doctor's Assocs., Inc. v. Casarotto,
517 U.S. 681 (1996).....5

Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta,
458 U.S. 141 (1982).....17

Fisher v. A.G. Becker Paribas Inc.,
791 F.2d 691 (9th Cir. 1986) 18

Granite Rock Co. v.
International B'hood of Teamsters,
561 U.S. 287 (2010).....10

Huffman v. Hilltop Cos.,
747 F.3d 391 (6th Cir. 2014) 16

Iskanian v. CLS Transp. L.A., LLC,
327 P.3d 129 (Cal. 2014).....18

KPMG LLP v. Cocchi,
132 S. Ct. 23 (2011) (*per curiam*) 11

Marmet Health Care Ctr., Inc. v. Brown,
132 S. Ct. 1201 (2012) (*per curiam*) 10

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 3, 7, 15, 16

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,
460 U.S. 1, 24 (1983).....3, 4, 5, 7, 18

Murphy v. DIRECTV, Inc.,
724 F.3d 1218 (9th Cir. 2013) 1, 12, 13

Mutual Pharm. Co. v. Bartlett,
133 S. Ct. 2466 (2013) 17

Nitro-Lift Techs., L.L.C. v. Howard,
133 S. Ct. 500 (2012) (*per curiam*) 7, 10

Oklahoma City v. Tuttle,
471 U.S. 808 (1985).....22

Oxford Health Plans LLC v. Sutter,
133 S. Ct. 2064 (2013) 6, 7

Perry v. Thomas,
482 U.S. 483 (1987).....22

Preston v. Ferrer,
552 U.S. 346 (2008).....5, 10

Rent-A-Center West, Inc. v. Jackson,
561 U.S. 63 (2010) 20

Rodriguez v. American Techs., Inc.,
39 Cal. Rptr. 3d 437 (Cal. Ct. App. 2006) 11

Sanchez v. Valencia Holding Co.,
__ P.3d __, 2015 WL 4605381
(Cal. Aug. 3, 2015) 12

Southland Corp. v. Keating,
465 U.S. 1 (1984) 22

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,
559 U.S. 662 (2010) 5, 6, 13

Vaden v. Discover Bank,
556 U.S. 49 (2009) 10

Volt Info. Scis., Inc. v.
Board of Trs. of Leland Stanford Jr. Univ.,
489 U.S. 468 (1989) 4, 5, 7, 11, 13, 16

Statutes and Rules

9 U.S.C. § 2 21

28 U.S.C. § 1257 22

28 U.S.C. § 1257(a) 21

S. Ct. R. 14(g)(i) 22

S. Ct. R. 15.2 ..... 10, 22

INTRODUCTION

Respondents struggle mightily to transform an easy case into a hard one. The parties here agreed to arbitrate their disputes unless "the law of your state" would require classwide arbitration, and specified that the Federal Arbitration Act (FAA) governs their arbitration agreement. The FAA preempts state law that requires classwide arbitration. Respondents argue that the reference to "the law of your state" in an agreement governed by the FAA refers to state law *preempted* by the FAA. That suggestion—as the Ninth Circuit recognized in interpreting the very agreement at issue here—is "nonsensical." *Murphy v. DIRECTV, Inc.*, 724 F.3d 1218, 1226 (9th Cir. 2013).

Respondents' primary answer is that the interpretation of arbitration agreements governed by the FAA is *entirely* a matter of state law, and that state courts are free to interpret such agreements as they wish—even if their interpretation is nonsensical. That position is not just nonsensical, but truly radical. Although state law generally provides the background rules governing contract interpretation, it always remains subject to federal substantive arbitration law established by the FAA. And, as this Court has stated time and again, such federal substantive law requires courts, among other things, to construe arbitration agreements with a healthy regard for the federal policy favoring arbitration, and resolve any doubts in favor of arbitration. Were the law otherwise, state law could defeat at will the federal right to enforce an arbitration agreement.

Once it is understood that the FAA imposes federal substantive limits on the interpretation and enforcement of arbitration agreements, respondents have remarkably little to say. They cannot possibly establish that the state court here interpreted the parties' arbitration agreement with a healthy regard for the federal policy favoring arbitration, or resolved any doubts in favor of arbitration, as this Court's precedents require. To the contrary, the court below declared that the arbitration agreement here is amenable to two interpretations—one in which the parties' arbitration agreement is enforceable, and one in which it is not—and simply chose the arbitration-hostile interpretation. As a matter of federal substantive law, the court below was not free to make that choice.

Respondents fare no better by urging this Court to dismiss the writ as improvidently granted. Rather, they simply rehash arguments that they made, without success, in opposing the writ in the first place. Just as this Court rejected those arguments then, it should reject them now.

At bottom, respondents are inviting this Court to roll back decades of settled federal arbitration law by holding that the interpretation of an arbitration agreement governed by the FAA is entirely a matter of state law. This Court should decline the invitation, reaffirm the longstanding rule that state contract law in this context is subject to limits imposed by federal arbitration law, and reverse the judgment.

ARGUMENT

I. State Law Rules Governing Contract Interpretation And Enforcement Are Subject To Long-Established Limitations Imposed By The FAA.

Respondents begin their argument by asserting that "DIRECTV wants something unprecedented"—"[i]t wants this Court to overturn a state court's interpretation of state law." Resps. Br. 11. But that assertion assumes that the interpretation and enforcement of an arbitration agreement governed by the FAA is *entirely* a matter of state law, and that the FAA has no role to play. That assumption is manifestly incorrect.

This Court has long recognized that the FAA "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act," and applicable "notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-49 (2006) (holding, as a matter of federal substantive law, that an arbitration clause is severable from the rest of the contract *regardless* of contrary state law). Such federal substantive law applies, as relevant here, to "the construction of the contract language itself." *Moses H. Cone*, 460 U.S. at 25; *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 n.8 (1995). And such federal substantive law requires courts, among other things, to interpret arbitration agreements "with a healthy regard for the federal policy favoring arbitration," and to resolve "any

doubts" in favor of arbitration. *Moses H. Cone*, 460 U.S. at 24-25.

Respondents insist, however, that "this Court's precedents establish that state law governs the construction of an arbitration clause." Resps. Br. 11 (capitalization modified); *see also id.* at 6 (asserting that it is a "settled principle under the [FAA] that state law determines the meaning of arbitration provisions in ordinary contracts like this one"). That argument is impossible to square with the precedents cited above, and respondents make no effort to do so.

Rather, they base their argument on the unremarkable proposition, articulated by this Court in *Volt Info. Scis., Inc. v. Board of Trs. of Leland Stanford Jr. Univ.*, that "'the interpretation of private contracts is *ordinarily* a question of state law, which this Court does not sit to review.'" Resps. Br. 12 (emphasis added; quoting 489 U.S. 468, 474 (1989)). In their view, *Volt* establishes that the interpretation of an arbitration agreement governed by the FAA is *entirely* a matter of state law, and that a state court's interpretation of such an agreement is thus "unassailable" in this Court. *Id.* at 28. But that gets *Volt* exactly backwards. That case recognizes that federal substantive arbitration law "establish[es] that, in applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act, due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." *Volt*, 489 U.S. at 475-76 (internal citation omitted). It is not true,

thus, that *Volt* "reject[ed] the claim that there was a general federal policy favoring arbitration." Resps. Br. 29.

Nor is it true that, "if DIRECTV were correct, then *Volt*—which held that the contract incorporated a state-law rule that *inhibited* arbitration, despite the invocation of the same supposed presumption—would have come out the other way." *Id.* at 22 (emphasis added). The *Volt* Court upheld the state court's interpretation of the arbitration agreement to incorporate state procedural rules precisely because it concluded that "the California arbitration rules which the parties have incorporated into their contract generally *foster* the federal policy favoring arbitration." 489 U.S. at 476 n.5 (emphasis added); *see also id.* at 476 ("Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration—rules which are manifestly designed to *encourage* resort to the arbitral process—simply does not offend the rule of liberal construction set forth in *Moses H. Cone*, nor does it offend any other policy embodied in the FAA.") (emphasis added). *Volt*, in short, was not a case—like this one—where a state court invoked state law to thwart federal arbitration rights. *See generally Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) ("The state rule examined in *Volt* determined only the efficient order of proceedings; it did not affect the enforceability of the arbitration agreement itself."); *see also Preston v. Ferrer*, 552 U.S. 346, 361 (2008).

Just as respondents' reliance on *Volt* is misplaced, so too are their efforts to distinguish *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010). They assert that "in *Stolt-Nielsen*, the Court *refused*

to override an arbitrator's determination that the parties' agreement authorized class-wide arbitration, rejecting the assertion that such a construction was contrary to principles embodied in the Act." Resps. Br. 29 (emphasis added). In their view, *Stolt-Nielsen* thus "stand[s] for the proposition that this Court does not sit to revisit the conclusion that the parties have entered into agreements that ... require that [arbitration] be conducted under certain rules." *Id.*

But that argument raises the question whether respondents have even read *Stolt-Nielsen*. The holding of that case is directly opposite from their description: the Court there *rejected* an arbitration panel's determination that an agreement that was concededly "silent" with respect to classwide arbitration could nonetheless be construed to authorize classwide arbitration. *See* 559 U.S. at 684-87. The *Stolt-Nielsen* Court did not conclude that the arbitration panel had erred in construing the parties' agreement as a matter of *state* law; instead, the arbitrators had overstepped their authority as a matter of *federal* law. As the Court explained, "a party may not be compelled *under the FAA* to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." *Id.* at 684 (emphasis modified). Needless to say, that holding would be inexplicable if, as respondents assert, the interpretation of an arbitration agreement governed by the FAA were solely a matter of state law.

Respondents' reliance on *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), is equally unavailing. The parties there *agreed* that they had delegated the interpretation of their arbitration

agreement, including the availability of class arbitration, to the arbitrator, and this Court thus reviewed the arbitrator's interpretation of the agreement under the FAA's narrow standard of review of arbitration decisions. *See id.* at 2068-70 & n.2. This case, in contrast, involves a threshold dispute over the enforceability of the parties' arbitration agreement—a dispute for a court, not an arbitrator, to resolve.

Respondents similarly err by asserting that "DIRECTV never articulates anything resembling an administrable legal rule for courts to identify which matters are assigned to [state] law and which are the province of [federal law]." Resps. Br. 19. As noted above, this Court has repeatedly articulated such a rule. In the absence of an agreement to the contrary, state law generally provides the background rules governing contract interpretation, but—with respect to arbitration agreements governed by the FAA—federal law imposes a check on state law. In particular, the FAA establishes a "federal policy favoring arbitration" that requires courts, among other things, to resolve "any doubts" in the interpretation and enforcement of an arbitration agreement "in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25; *see also Mastrobuono*, 514 U.S. at 62; *Volt*, 489 U.S. at 476; *cf. CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 675 (2012) (Sotomayor, J., joined by Kagan, J., concurring in judgment) ("[W]e resolve doubts in favor of arbitration."). In the absence of such federal substantive arbitration law—as this case vividly illustrates—courts could invoke state law to defeat federal arbitration rights at will. *See, e.g., Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*) (state court's

suggestion that enforcement of arbitration agreement governed by FAA "is purely a matter of state law for state-court determination" provides "all the more reason for this Court to assert jurisdiction").

Respondents' "slippery slope" argument is thus baseless. According to respondents, "DIRECTV's suggestion that only extreme misinterpretations of arbitration provisions need be corrected would still require the federal courts to examine and overturn the Contract's established meaning under state law." Resps. Br. 6-7. As noted above, it has long been settled that the FAA creates federal substantive arbitration law that preempts state law inconsistent with the federal policy favoring arbitration. In (presumably rare) cases, like this one, where courts ignore the federal policy favoring arbitration and construe any doubts against arbitration, this Court unquestionably has the authority under the FAA to vindicate federal arbitration rights.

Indeed, respondents' position that the interpretation of an arbitration agreement governed by the FAA is invariably a matter of state law alone conflicts with their recognition elsewhere that that the FAA "freely permits parties to shape their own arbitration agreements." Resps. Br. 1; *see also id.* at 7 (recognizing "[t]he core principle under the Act ... that the parties' own agreements will be respected.").

Respondents insist, however, that the parties here agreed that state law alone would govern the interpretation of their arbitration agreement. *See* Resps. Br. 6-7, 17-24. In their view, the contractual choice-of-law provision (Section 10) mandates the application of state law to govern the interpretation

of the arbitration provision (Section 9). *See, e.g.*, *id.* at 18 ("Here, the Contract provides, with respect to California customers like respondents, that it will be interpreted according to California law."); *id.* at 30 ("[T]he choice-of-law provision ... incorporates California law.").

Again, this argument raises the question whether respondents have even read the relevant provisions. Far from mandating the application of state law to the arbitration provision, the choice-of-law provision does precisely the opposite. As a general matter, it specifies that "[t]he interpretation and enforcement of this Agreement shall be governed by [1] the rules and regulations of the Federal Communications Commission, [2] other applicable federal laws, and [3] the laws of the state and local area where Service is provided to you." 2007 Customer Agreement § 10(b), JA129. And, as relevant here, it then proceeds to specify that "*[n]otwithstanding the foregoing*, Section 9 [the arbitration provision] shall be governed by the Federal Arbitration Act." *Id.* (emphasis added). How respondents can draw from this provision the proposition that "Section 10's choice-of-law provision requires interpreting the agreement under California law," so that the parties agreed that "California law determines what constitutes the 'law of the [customer's] state" in the arbitration provision, Resps. Br. 6, is a mystery.

While it is thus true, as respondents observe, that "[i]t is not possible to interpret the agreement correctly while ignoring the body of law that the parties chose to direct its interpretation," *id.* at 18, that observation cuts decisively against respondents. The parties here went out of their way, as a

contractual matter, to specify that their arbitration agreement "shall be governed by the Federal Arbitration Act." 2007 Customer Agreement § 10(b), JA129. Thus, even if the FAA did not govern this dispute as a statutory matter (which it does, *see* DIRECTV Br. 14), it unquestionably governs this dispute as a contractual matter.

For this reason, respondents' unsubtle pitch for Justice Thomas' vote is misguided. *See* Resps. Br. 27 ("[R]espondents ask that Justice Thomas adhere to his view that the [FAA] does not apply to cases, like this one, that originate in state court and raise state law claims."). As a threshold matter, respondents have never argued at *any* stage of these proceedings—either in the courts below or in their opposition to the petition—that the FAA does not apply in state court, and thus are in no position to challenge this Court's clear precedent holding the FAA applicable in state court. *See, e.g.*, S. Ct. R. 15.2; *Granite Rock Co. v. International B'hood of Teamsters*, 561 U.S. 287, 306 (2010).[1] In addition, Justice Thomas has joined this Court's three most recent decisions applying the FAA to overturn a state court's refusal to enforce federal arbitration rights. *See Nitro-Lift Techs.*, 133 S. Ct. at 503; *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202 (2012) (*per curiam*); *KPMG LLP v. Cocchi*, 132

---

[1] Moreover, there is no basis for questioning a precedent that this Court has specifically and repeatedly reaffirmed. *See, e.g.*, *Preston*, 552 U.S. at 353 n.2; *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271-72 (1995); *cf. Vaden v. Discover Bank*, 556 U.S. 49, 59 (2009) ("[S]tate courts have a prominent role to play as enforcers of agreements to arbitrate.").

S. Ct. 23, 24 (2011) (*per curiam*). Finally, neither Justice Thomas nor any other Member of this Court has ever questioned the authority of contracting parties to specify that the FAA governs their arbitration agreement, regardless of the forum in which that agreement is litigated. *See, e.g.*, *Rodriguez v. American Techs., Inc.*, 39 Cal. Rptr. 3d 437, 445 (Cal. Ct. App. 2006) (enforcing parties' agreement to apply FAA § 3, a procedural provision that may not apply of its own force in state court); *cf. Volt*, 489 U.S. at 477 n.6 (reserving question whether FAA § 3 applies of its own force in state court). Accordingly, even if the FAA did not govern here of its own force, it plainly governs here by virtue of the parties' agreement.

In yet another unsubtle pitch for votes, respondents devote an entire subsection of their brief to rebutting what they characterize as "DIRECTV's argument ... that the Act preempts California's prohibition on class action waivers, *even when (as in this case) the parties themselves agree to be bound by that state law rule.*" Resps. Br. 24 (emphasis added); *see generally id.* at 24-28. According to respondents, DIRECTV is thereby attempting "to extend" *Concepcion* in this case, and "the members of the Court who dissented in *Concepcion*" should reject DIRECTV's position. *Id.* at 27 (referencing *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)).

That argument is a red herring. *Concepcion* involved the entirely different question "whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." *Concepcion*, 131 S. Ct. at 1744. This Court answered

that question in the affirmative, and respondents do not challenge that holding here. *See* Resps. Br. 7 (acknowledging that it "is true" that the FAA "preempts a state from requiring the parties to litigate as a class"); *cf. Sanchez v. Valencia Holding Co.*, __ P.3d __, 2015 WL 4605381, at *15 (Cal. Aug. 3, 2015) (holding, contrary to the suggestion of several of respondents' *amici*, that the FAA preempts the prohibition on class action waivers in California's Consumers Legal Remedies Act).

In contrast, as DIRECTV explained in the first line of its opening brief, "[t]his case involves the interpretation of an arbitration agreement." DIRECTV Br. 1. Contrary to respondents' assertion, DIRECTV has never argued that, if indeed the parties here had agreed that the enforceability of their arbitration agreement would turn on state law preempted by the FAA, that statute would nonetheless preclude enforcement of that agreement. To the contrary, DIRECTV acknowledged that "[c]ontracting parties can always choose ... to bind themselves by reference to state law that has been 'nullified' by federal law, just as they can choose to bind themselves by reference to the rules of a board game." *Id.* at 20. The point here is that it would be "nonsensical" to interpret their agreement that way, *Murphy*, 724 F.3d at 1226, and the FAA does not permit courts to choose a nonsensical contract interpretation over one that favors arbitration. On that score, there was no disagreement among the Members of this Court in *Concepcion* (or any other case).

II. The Court Below Erred By Refusing To Enforce The Parties' Arbitration Agreement.

Once it is clear that the FAA neither requires nor permits this Court to rubber-stamp the California Court of Appeal's interpretation of the parties' arbitration agreement, the only question is whether that court faithfully applied the "federal policy favoring arbitration," *Moses H. Cone*, 460 U.S. at 24, by "'giv[ing] effect to the contractual rights and expectations of the parties,'" *Stolt-Nielsen*, 559 U.S. at 682 (quoting *Volt*, 489 U.S. at 479), and resolving "any doubts" in favor of arbitration, *Moses H. Cone*, 460 U.S. at 24. The answer to that question is plainly "no."

Contrary to respondents' assertion, the parties here did not "incorporate into their agreement California's state-law prohibition on class action waivers." Resps. Br. 17. They did just the opposite: they agreed to a class-action waiver so that any arbitration would proceed on an individual basis. *See* 2007 Customer Agreement § 9(c), JA128-29. Indeed, to underscore their *rejection* of state-law prohibitions on class-action waivers, they specified that their entire arbitration agreement would be "unenforceable" if a state-law prohibition on class-action waivers would apply. *Id.* And they further specified that their arbitration agreement "shall be governed by the Federal Arbitration Act." *Id.* § 10(b), JA129. In this context, as the Ninth Circuit has explained, it is "nonsensical" to suggest that the parties intended the reference to "the law of your state" in the arbitration provision to refer to a state-law prohibition on class-action waivers preempted by the FAA. *Murphy*, 724 F.3d at 1226.

The California Court of Appeal, however, declared that the parties' contract did not provide an "explicit" answer to the interpretive question presented. Pet. App. 8. According to that court, the contractual phrase "the law of your state" could refer to *actual* state law subject to the ordinary preemptive force of federal law or *hypothetical* state law immune from the ordinary preemptive force of federal law. *See id.* In deciding which of those alternatives to choose—one of which would render the parties' arbitration agreement unenforceable, the other of which would not—the court did not mention, much less apply, the federal policy favoring arbitration.

Instead, the court relied primarily on the maxim that "when a general and a particular provision are inconsistent, the particular and specific provision is paramount to the general provision." Pet. App. 8-9a (internal quotation omitted). The court held that the reference to "the law of your state" in the arbitration provision operates as a specific exception to the general rule that the arbitration provision is governed by the FAA. *See* Pet. App. 9a. But that interpretation, as DIRECTV pointed out in its opening brief, *see* DIRECTV Br. 21, begs the question: the maxim that the specific trumps the general applies only in the event of inconsistency, and there is no inconsistency here *unless* "the law of your state" is interpreted in a highly unorthodox and idiosyncratic manner—*i.e.*, to refer to "the law of your state" immune from the ordinary preemptive force of federal law. Ironically, thus, the Court of

Appeal invoked a maxim used to *resolve* inconsistency to *create* inconsistency.[2]

Respondents offer not a word in defense of the state court's interpretation on this score. Rather, they simply assert that, "as the California Court of Appeal concluded, the more specific incorporation of the 'law of [the customer's] state' controls over the general application of the Act." Resps. Br. 30. But that is a *description*, not a *defense*, of the court's holding.

The other ground on which the Court of Appeal sought to justify its interpretation of the parties' arbitration agreement was to invoke "'the common-law rule ... that a court should construe ambiguous language against the interest of the party that drafted it.'" Pet. App. 10a (quoting *Mastrobuono*, 514 U.S. at 62). But that maxim, as DIRECTV explained in its opening brief, is a tool to *resolve* ambiguity, not to *create* ambiguity, and thus presupposes that the contract is ambiguous in the first place. *See* DIRECTV Br. 22. Here, there is no ambiguity.

Once again, respondents offer not a word in defense of the state court's interpretation on this score. Rather, they simply assert that, "for the reasons given by the California Court of Appeal, the contract is at the very least ambiguous." Resps. Br.

---

[2] As *amici* point out, the California Court of Appeal's interpretation of "the law of your state" is also inconsistent with the California courts' previous interpretation of such contractual language, and provides additional support for the conclusion that the lower court's decision violates Section 2 of the FAA. *See Amicus* Br. of U.S. Chamber *et al.* at 6-12.

29 (emphasis omitted). Once again, that is a *description*, not a *defense*, of the court's holding.

Nor, contrary to respondents' assertion, has this Court "recognized" that "ambiguity is properly resolved against ... the party that drafted" an arbitration agreement. *Id.* at 29-30 (citing *Mastrobuono*, 514 U.S. at 62-63). To the contrary, *Mastrobuono* reaffirmed the settled rule that, as a matter of federal substantive arbitration law, "'ambiguities as to the scope of the arbitration clause itself [must be] resolved in favor of arbitration.'" 514 U.S. at 62 (quoting *Volt*, 489 U.S. at 476). In *Mastrobuono*, application of that settled rule cut the same way as application of the maxim of construing contracts against the drafter—the drafter in that case was the one seeking to limit arbitration rights. *See id.* at 58-63. As DIRECTV noted in its opening brief, where these two interpretive principles are in tension, the FAA's "'strong presumption in favor of arbitration'" prevails. DIRECTV Br. 23 (quoting *Huffman v. Hilltop Cos.*, 747 F.3d 391, 396-97 (6th Cir. 2014)). Yet again, respondents offer no response.

Because respondents are unable to defend the Court of Appeal's decision on its own terms, they advance a number of additional arguments. These arguments are equally unavailing.

First, respondents argue that the phrase "the law of your state" refers to state law in existence at a given moment in time, although respondents do not specify when that moment is. *See* Resps. Br. 31-33. Rather, they suggest that the moment might be "(1) when respondents terminated their DIRECTV services; (2) when DIRECTV imposed the fees giving

rise to respondents' state law claims; and (3) when respondents initiated this action." *Id.* at 3; *see also id.* at 31. They are forced to speculate as to these various moments, because their theory has no basis whatsoever in the parties' agreement.

To the contrary, the agreement specifies that the parties will arbitrate their disputes unless "the law of your state would find this agreement to dispense with class arbitration procedures unenforceable," in which event the entire arbitration agreement would be unenforceable. 2007 Customer Agreement § 9(c), JA128-29. It does not refer to "the law of your state" at any given moment, or suggest that state law is frozen in time and impervious to subsequent developments. In the absence of any such limitation, there is no basis to make one up. In particular, there is no basis to conclude that the parties intended "the law of your state" to refer to *inoperative* law (*e.g.*, law that has been preempted, overruled, or repealed), and indeed inoperative law is no longer "law" at all. *See, e.g.*, *Mutual Pharm. Co. v. Bartlett*, 133 S. Ct. 2466, 2473 (2013) (state law preempted by federal law is "without effect"); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (state law preempted by federal law is "nullified").

Nor is there any merit to respondents' argument that the contract must have referred to state law frozen at a given moment in time because, otherwise, the parties' arbitration agreement might be triggered "in the middle (or even near the end) of litigating the dispute." Resps. Br. 32. Respondents note in this regard that DIRECTV did not seek to compel arbitration here until, more than two years into this litigation, this Court decided *Concepcion*. *See id.*

But this argument has nothing to do with the language of the parties' arbitration agreement. Rather, it is a variation on the waiver argument that respondents made (but on which they did not prevail) below, and which they have never made in this Court. And there is good reason that they do not make a waiver argument: consistent with federal substantive arbitration law (which governs "an allegation of waiver," *Moses H. Cone*, 460 U.S. at 25), parties need not bring futile motions to compel arbitration to preserve their arbitration rights. *See, e.g.*, *Ackerberg v. Johnson*, 892 F.2d 1328, 1332-33 (8th Cir. 1989); *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694-97 (9th Cir. 1986); *see also Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 143-45 (Cal. 2014).

Second, respondents argue that "[o]rdinary usage," and the parties' agreement here, distinguishes state from federal law. *See* Resps. Br. 33-34. But DIRECTV does not suggest that there is no difference between state and federal law. Rather, the point here is that there is no reason to suppose that the parties' reference to "the law of your state" means hypothetical state law immune from the ordinary preemptive force of federal law, and the federal policy favoring arbitration does not allow such an unlikely interpretation. Indeed, respondents cite no case in the history of American law holding that a contractual reference to state law signifies the parties' intent to abide by state law preempted by federal law.

And *third*, respondents argue that unless the contractual reference to "the law of your state" encompasses state law preempted by federal law, the

reference to "the law of your state" would be "surplusage," because "no state law triggers its provisions." Resps. Br. 35. But that argument assumes clairvoyance by contracting parties before *Concepcion*. At that time, it was not clear that the FAA preempted state law purporting to invalidate class-action waivers in arbitration agreements. Thus, it was entirely prudent for parties who wanted to ensure that they would not be forced into class arbitration to specify that their arbitration agreement would not be enforceable if state law would invalidate a class-action waiver. And just because subsequent legal developments make it unlikely that the proviso will be triggered does not render that provision "surplusage" such that it should be twisted to mean something other than what it says.

III. Respondents' Arguments In Favor Of Dismissal Are Unavailing.

Finally, in an apparent show of desperation, respondents urge this Court to dismiss the writ as improvidently granted. *See* Resps. Br. 39-45. But they do little more than rehash the arguments they made (unsuccessfully) in opposing the petition for certiorari in the first place. Those arguments did not work then, and they do not work now.

First, respondents argue, as they did in opposing the petition, *see* Pet. Opp. 8, that this case does not involve the interpretation of an arbitration agreement, but instead "the antecedent question whether the parties entered into an arbitration agreement at all," Resps. Br. 39; *see also id.* at 10 ("[T]he lower court concluded that the parties had

not entered into an agreement to arbitrate their disputes in the first place.").

That argument, as DIRECTV explained in its reply to respondents' brief in opposition, is "mystifying." Pet. Reply 4. There is no question that the parties entered into an arbitration agreement, and the California Court of Appeal never "concluded" otherwise. Resps. Br. 10. The parties' agreement specifies that "[i]f we cannot resolve a Claim informally, any Claim either of us asserts will be resolved *only* by binding arbitration." 2007 Customer Agreement § 9(b), JA128 (emphasis added). Although the court below declined to enforce this arbitration agreement, it never denied its existence. Rather, the court held that "*under the terms of the parties' arbitration agreement*, the motion [to compel arbitration] was correctly denied." Pet. App. 3a (emphasis added). Indeed, respondents themselves never denied below that they had entered into an arbitration agreement with DIRECTV. *See, e.g.*, Pet. App. 6a. And even now, respondents "agree" with DIRECTV that "the parties entered into an arbitration agreement, which is governed by the [FAA]." Resps. Br. 17.

Insofar as respondents mean to argue that if the parties' arbitration agreement is not *enforceable*, then it does not *exist*, that argument is a legal and logical *non sequitur*. As this Court has explained, "[t]he issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was ever concluded." *Buckeye*, 546 U.S. at 444 n.1; *see also Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63, 70 n.2 (2010). There is no dispute here that the parties "formed an

agreement 'to settle by arbitration a controversy thereafter arising out of their contract,'" Resps. Br. 41 (quoting 9 U.S.C. § 2; emphasis omitted); the only dispute is whether, by its terms, that arbitration agreement is "unenforceable," 2007 Customer Agreement § 9(c), JA129. And that is the question presented by this case, not a reason to dismiss the writ.

Second, respondents argue—as they did in opposing the petition, *see* Pet. Opp. i, 3, 5-10—that this case presents only a question of state law. "The California Court of Appeal's definitive construction of the Contract under state law is controlling and therefore eliminates any conflict with the Ninth Circuit's previous interpretation of the Contract." Resps. Br. 10; *see also id.* at 43.

But that argument—in addition to wholly mischaracterizing the Ninth Circuit's analysis, which rested on the federal principles presented here, *see Murphy*, 724 F.3d at 1225-28—is just a restatement of respondents' merits argument that the interpretation of an arbitration agreement governed by the FAA is *entirely* a matter of state law. As DIRECTV has repeatedly explained, *see* Pet. Reply 1, 3-12; DIRECTV Br. 11-14; *supra* Section I, that argument is plainly incorrect, and at the very least presents a federal question under the FAA. Respondents' conviction that they are correct on the merits, in addition to being ill-founded, provides no reason to dismiss the writ.

Finally, respondents suggest that this Court lacks jurisdiction over this case under 28 U.S.C. § 1257(a), because "that statute applies to 'final' judgments, whereas the Court of Appeal's judgment in this case

is interlocutory." Resps. Br. 45. Respondents raised a similar suggestion in opposing the petition, urging this Court to "deny review of the issues presented herein until a final judgment." Pet. Opp. 4. But, as DIRECTV pointed out in reply, this Court has long recognized that the denial of a motion to compel arbitration in state court is a "final" decision reviewable by this Court under 28 U.S.C. § 1257. *See* Pet. Reply 8 (citing *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984)); *see also Perry v. Thomas*, 482 U.S. 483, 489 n.7 (1987). Because respondents do not even challenge this rule, it certainly provides no basis to dismiss the writ.

On a related note, respondents complain that DIRECTV's petition for certiorari did not "specify when, in all the lower courts, 'the federal questions sought to be reviewed were raised.'" Resps. Br. 44 (quoting S. Ct. R. 14(g)(i)). As a threshold matter, the time is long past for respondents to raise a procedural challenge to the petition for certiorari; they had their chance to do so in their opposition to that petition. *See, e.g.*, S. Ct. R. 15.2; *Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985). Respondents candidly acknowledge that they "did not raise this argument in the brief in opposition," Resps. Br. 45, which means it is waived. In any event, on the merits, respondents' suggestion that DIRECTV did not rely on federal law in seeking to compel arbitration in the state courts below, *see id.* at 44-45, is simply false. To the contrary, DIRECTV based its motion to compel arbitration on the argument that "plaintiffs entered into valid and enforceable arbitration agreements with DIRECTV, and *the FAA* requires that they be enforced as written," Mem. in Support of Mot. to Compel Arbitration (5/17/11), at 8

(argument heading) (emphasis added; capitalization modified), and invoked federal law at every subsequent stage of those proceedings.

It is similarly disingenuous for respondents to suggest, by citing snippets from the record that predate *Concepcion*, that DIRECTV conceded below that "state law controls" the meaning of "the law of your state" in the arbitration provision. Resps. Br. 45; *see also id.* at 3-4, 19, 23-24, 31. Prior to *Concepcion*, it was entirely reasonable to believe that California law precluded enforcement of the parties' arbitration agreement, and (as noted above) it would have been futile for DIRECTV to argue otherwise. *See, e.g., Cohen v. DIRECTV, Inc.*, 48 Cal. Rptr. 3d 813, 819-21 (Cal. Ct. App. 2006). *Concepcion* made clear that the FAA preempts California law in this regard, which is why DIRECTV moved to compel arbitration promptly after *Concepcion*. DIRECTV has maintained at every stage of these proceedings that the FAA governs the parties' arbitration agreement, preempts "the law of your state" insofar as such law would deny effect to a class action waiver, and "reflects a strong policy favoring arbitration of disputes." Mem. in Support of Mot. to Compel Arbitration (5/17/11), at 8.

* * *

The FAA requires courts, as a matter of federal substantive law, to enforce arbitration agreements according to their terms and resolve any doubts in favor of arbitration. The court below did just the opposite: it adopted a nonsensical interpretation of the parties' agreement that thwarted their federal arbitration rights. This Court need not and must not tolerate such defiance of federal law.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment.

Respectfully submitted,

MELISSA D. INGALLS
ROBYN E. BLADOW
SHAUN PAISLEY
KIRKLAND & ELLIS LLP
333 S. Hope St.
Los Angeles, CA 90071
(213) 680-8400

CHRISTOPHER LANDAU, P.C.
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com